

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 18, 2019 appellant, then a 57-year-old scheduling officer, filed a traumatic injury claim (Form CA-1) alleging that on October 17, 2019 she experienced an asthma attack when exposed to dust while in the performance of duty. She stopped work on the date of injury.

In support of her claim, appellant submitted an October 17, 2019 hospital emergency department report by Dr. Richard D. Zane, Board-certified in emergency medicine. Dr. Zane related that appellant had a history of asthma, and had not experienced a severe exacerbation since 2014 until that day while in her office in the baggage claim area at work. He attributed the current episode to odor and mold caused by water leaking through the ceiling tiles in her office. On examination, Dr. Zane observed diminished expiratory sounds with end expiratory wheezing, coughing, tachycardia, dyspnea, respiratory distress, and tremulousness. As nebulizer treatments in the emergency department did not improve appellant's symptoms, she was admitted to the intensive care unit. Dr. Zane diagnosed an asthma exacerbation attack.

In an October 17, 2019 intensive care unit report, Dr. Richard William Vandivier, Board-certified in internal medicine and pulmonology, noted that appellant presented with acute shortness of breath while at work. He noted "[s]he states that there has been some construction and leaking of moldy odor fluid in her office which likely precipitated her shortness of breath."

In an October 18, 2019 hospital discharge report, Dr. Vandivier diagnosed an asthma exacerbation and prescribed medication. He noted that it was important for appellant to avoid any environmental triggers, particularly at her workplace, "to prevent this from occurring again."

In a development letter dated June 12, 2020, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence necessary to establish her claim and provided a questionnaire for her completion. In a separate development letter of even date, OWCP requested that the employing establishment provide comments from a knowledgeable supervisor on the accuracy of appellant's statements and the type of tasks performed which resulted in the exposure and the duration. It afforded both parties 30 days to provide the necessary evidence.

In response, the employing establishment provided a June 22, 2020 statement confirming that in the area where appellant was seated on October 17, 2019, there were missing ceiling tiles and large trashcans placed to collect dripping water. There was also a "smell that was not right. [Appellant] began coughing and using her emergency inhaler." She left the area at her supervisor's instruction, but her breathing became more erratic. Paramedics were called to the scene and recommended appellant be taken to an emergency department. Appellant's husband then transported her to the hospital.

In a June 24, 2020 statement, appellant's supervisor, asserted that on the date appellant experienced an asthma attack, "[w]hen entering the office there was a strong mildew smell with several wet ceiling tiles and trash cans filled with water." Appellant began coughing 30 minutes after her arrival. She exited the office to get fresh air, then began struggling to breathe. Paramedics were summonsed and administered medication, which did not relieve appellant's symptoms. Appellant's husband then transported her to the hospital.

By decision dated July 23, 2020, OWCP accepted that the October 17, 2019 incident occurred as alleged but denied appellant's claim as the medical evidence of record did not contain a diagnosis causally related to the accepted incident. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On August 11, 2020 appellant requested reconsideration. She submitted additional medical evidence.

In an August 4, 2020 report, Dr. Mark Nathanson, an osteopath specializing in family medicine, noted treating appellant for severe, persistent asthma for more than five years.

Appellant also submitted employing establishment e-mails dated from October 18 through 20, 2019 noting that a water pipe had broken above her work area, causing extensive leakage and significant odor. In an October 18, 2019 e-mail, a safety specialist, cautioned that there were "layers of particles that can easily set off [appellant's] asthma again."

By decision dated September 16, 2020, OWCP denied reconsideration of the merits of appellant's claim.

On December 2, 2020 appellant requested reconsideration. She submitted an October 1, 2020 report by Dr. Nathanson, who noted that appellant had been doing fairly well with her asthma until an exacerbation at work caused by black mold on waterlogged tiles which caused appellant to be hospitalized due to the injury. Dr. Nathanson diagnosed a resolved severe exacerbation of moderate persistent allergic asthma, vocal cord dysfunction, and stable asthma. He prescribed medication.

By decision dated March 5, 2021, OWCP modified its July 23, 2020 decision to find that appellant had established a diagnosis that could reasonably be connected to the claimed condition. The claim remained denied as the medical evidence of record was insufficient to establish causal relationship.

On May 12, 2021 appellant requested reconsideration. She submitted a May 7, 2021 statement reiterating her account of the events of October 17, 2019. Appellant also submitted an April 26, 2021 note from Dr. Nathanson noting that her "[a]cute attack which led to hospitalization" was "caused by dust and other particulate components which stemmed from wet ceiling tiles at her place of work." He opined, "this is what brought on her attack."

By decision dated May 19, 2021, OWCP denied appellant's request for reconsideration. It found, "[s]pecifically, causal relationship is a medical issue and you did not submit any medical evidence in support of your request for reconsideration. We have not received a well-rationalized medical report...."

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.²

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.³

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁴ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁵ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.⁶

ANALYSIS

The Board finds that this case is not in posture for decision.

In denying appellant's request for reconsideration, OWCP did not reference Dr. Nathanson's April 26, 2021 report addressing the causal relationship between the claimed asthma attack to appellant's exposure to wet ceiling tiles and particulates at the employing establishment.

In the case of *William A. Couch*,⁷ the Board held that, when adjudicating a claim, OWCP is obligated to consider all evidence properly submitted by a claimant and received by OWCP before the final decision is issued. While OWCP is not required to list every piece of evidence submitted to the record, there is no indication that Dr. Nathanson's April 26, 2021 report was reviewed and considered by OWCP in its May 19, 2021 decision.⁸ In its May 19, 2021 decision, OWCP denied appellant's request for reconsideration, finding that she failed to submit any medical evidence in support of her request for reconsideration. As it did not review or consider

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.606(b)(3).

⁴ *Id.* at § 10.607(a).

⁵ *Id.* at § 10.608(a).

⁶ *Id.* at § 10.608(b).

⁷ 41 ECAB 548, 553 (1990).

⁸ *See T.G.*, Docket No. 19-1930 (issued January 8, 2021).

Dr. Nathanson's April 26, 2021 report, it failed to follow its own procedures by properly discussing the relevant evidence of record.⁹

As the Board's decisions are final as to the subject matter appealed, it is crucial that OWCP address all relevant evidence properly submitted to OWCP prior to the issuance of its decision.¹⁰

For this reason, the case will be remanded to OWCP to properly consider all of the evidence of record. Following this and other such further development as deems necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

⁹ All evidence submitted should be reviewed and discussed in the decision. Evidence received following development that lacks probative value should also be acknowledged. Whenever possible, the evidence should be referenced by author and date. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Denials*, Chapter 2.1401.5(b)(2) (November 2012).

¹⁰ 20 C.F.R. § 501.6(d); *supra* note 8; *W.G.*, Docket No. 20-1536 (issued December 17, 2021); *see also A.V.*, Docket No. 20-1251 (issued January 28, 2021).

ORDER

IT IS HEREBY ORDERED THAT the May 19, 2021 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: March 15, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board